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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 670

LEONE C. FINNELL,

Petitioner,

VS.

LEO EDWIN BROMBERG,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Nevada

GEORGE N. LEIGHTON,
123 W. Madison Street,
Chicago, Illinois,

DOUGLAS A. BUSEY,
West First Street of Roff Way,
Reno, Nevada,

Counsel for Petitioner.

MIDWEST LAW PRINTING CO., 336 N. MICHIGAN, CHICAGO 60601, FINANCIAL 6-3068

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Leone C. Finnell, petitioner, prays that a writ of certiorari issue to review a judgment of the Supreme Court of Nevada dismissing an appeal from the Second Judicial District Court.

OPINION BELOW.

There was no opinion of the Supreme Court of Nevada on dismissal. A copy of the dismissal order is Appendix "A" to this petition.

JURISDICTION.

The judgment of the Supreme Court of Nevada was entered August 12, 1964. The jurisdiction of this court is invoked under 28 U.S.C., Sec. 1257(3).

QUESTIONS PRESENTED.

1. Whether the Supreme Court of Nevada denied petitioner due process of law when it dismissed an appeal from a judgment of the Nevada trial court entered without jurisdiction because a prior mandate of the Supreme Court of Nevada had limited the trial court's jurisdiction to the grant of a new trial on a specific issue.

2. Whether a summary judgment entered by a Nevada trial court after a Nevada Supreme Court mandate limited the trial court's jurisdiction to grant of a new trial is so lacking in due process of law as to require review in this court by certiorari.

3. Whether a summary judgment of a Nevada trial court entered after a prior supreme court mandate limited the Court's jurisdiction to the grant of a new trial is void so that the question can be raised for the first time on application for certiorari.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

Amendment XIV.

> Section 1. • • • No state shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 56. SUMMARY JUDGMENT (Nevada Rules of Civil Procedure).

> (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.
>
> (b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> (c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

[As amended; effective March 16, 1964.]

STATEMENT.

Petitioner was a defendant in an action brought by respondent in the district court for the Second Judicial District, Washoe County, Nevada. Judgment was entered against her; and an appeal was taken to the Supreme Court of Nevada. The facts are reported in *Finnell* v. *Bromberg*, Nev. 211, 381 P. 2d 221. Judgment was affirmed in all respects except the fixing of the amount of damages. For this limited purpose, the cause was remanded for a new trial.

On remand the trial court entered certain orders from which a second appeal was taken, this time by respondent. The Supreme Court of Nevada reversed all the orders of the trial court and the cause was again remanded for a new trial, limited to the question of determining the market value of certain stock on June 2, 1959. *Bromberg* v. *Finnell*, ... Nev. ....., 391 P. 2d 31.

Instead of proceeding to a new trial, plaintiff filed a motion for summary judgment pursuant to the provisions of Nevada Rules of Civil Procedure (Rule 56, N.R.C.P.). The motion was served on a partner of petitioner's counsel. Service was acknowledged on June 15, 1964. On June 26, 1964, at 9:53 a.m., the summary judgment in the amount of $105,885.72, with costs, was entered against petitioner.

An appeal was taken to the Supreme Court of Nevada; but before brief on the merits could be filed, respondent moved to dismiss the appeal. Affidavits were submitted to the Supreme Court of Nevada showing that the motion for a summary judgment had been filed by respondent and served on a partner during the absence of petitioner's counsel. Respondent argued that the appeal was frivolous. The Supreme Court of Nevada dismissed the appeal thus letting stand the summary judgment entered after the Supreme Court of Nevada had remanded the cause for the limited purpose of granting petitioner a new trial.

REASONS FOR GRANTING THE WRIT.

1. Upon remand, the district court in Nevada had only such jurisdiction as the opinion and mandate of the Supreme Court of Nevada conferred. *Sproles* v. *McDonald*, ... N.M. ....., 392 P. 2d 584; *Chronister* v. *State Farm Mutual Auto Ins. Co.*, ... N.M. ....., 381 P. 2d 673; *in re. Wilson's Estate*, ... Wash. ....., 337 P. 2d 56. The Nevada district court did not have jurisdiction to enter a summary judgment against petitioner because the mandate of the Supreme Court of Nevada limited the trial court's power to a granting of a new trial to petitioner.

Inherently this is a constitutional concept because when the cause was remanded by the Supreme Court of Nevada the petitioner had notice that the district court was going to grant a new trial. Petitioner was not given that degree of notice and opportunity to be heard which is guaranteed by the Fourteenth Amendment of the Constitution of the United States as part of due process of law in state court proceedings.

2. Proceedings in a court of justice to determine the personal rights and obligations of parties by a court without jurisdiction do not constitute due process of law. 16A C.J.S. Sec. 616, page 779; *Hughes* v. *Fargo Loan Agency*, 178 N.W. 993, 997, 46 N.D. 26.

It is clear that the summary judgment entered after remand by the Supreme Court of Nevada for the limited purpose of granting petitioner a new trial, did not conform to the requirements of due process of law. It appears that contrary to Rule 56, N.R.C.P. (Nevada Rules of Procedure), the notice served did not afford petitioner

the opportunity to be heard which is secured and guaranteed by the Fourteenth Amendment of the Constitution of the United States.

3. A judgment which is void for lack of jurisdiction can be attacked at any time, in any proceeding. *State ex rel Smith* v. *Sixth Judicial Dist. Ct.*, ... Nev. ....., 167 P. 2d 648; *State ex rel Wood* v. *Haeger*, 33 P. 2d 753, 55 Nev. 331.

The judgment of the Nevada trial court left standing by dismissal of the appeal in the Nevada Supreme Court was void because it was entered without jurisdiction. Whether this is so is to be determined by an inspection of the record. *Beck* v. *Curti*, 45 P. 2d 601, 56 Nev. 72. Since the validity of the judgment can be raised at any time, including a collateral proceeding, this petition for writ of certiorari is the only relief available to petitioner.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

GEORGE N. LEIGHTON,
DONALD A. BUSEY,
Counsel for Petitioner.

Dated November 9, 1964.

APPENDIX "A"

IN THE SUPREME COURT OF THE STATE OF NEVADA

LEONE C. FINNELL,
Appellant,

vs.

LEO EDWIN BROMBERG,
Respondent.

No. 4794

ORDER DISMISSING APPEAL.

Respondent has moved to dismiss appellant's appeal on the ground that the same is frivolous and taken for delay only. His motion was supported by brief and affidavit. In response, appellant filed an opposing brief, and respondent, with the permission of the court, filed a reply brief.

Upon careful consideration we are satisfied that the appeal must be dismissed upon the ground that it is frivolous, and it is so ordered.

Dated August 12, 1964.

Badt, C.J.
Thompson, J.